Machira v Republic (Criminal Appeal E018 of 2023) [2024] KEHC 2712 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2712 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E018 OF 2023

DKN MAGARE, J

MARCH 14, 2024

BETWEEN

GILBERT GATHU MACHIRA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the Judgment and Sentence in Karatina PM SO. No. E003 of 2020 delivered by Hon. V. S. Kosgei – SRM on 8th March, 2023)

JUDGMENT

1. This is a fairly straight forward. The Appellant was charged with the offence of defilement. In the alternative he was charged with committing an indecent act with a minor contrary to Section 11(1) of the Sexual Offences Act. I need not set out the particulars in the circumstances of the case.

2. The duty of this court is well settled. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

3. In the case of *Maurice Okello Kaburu & another v Republic* [2022] eKLR , the court, G V. Odunga stated as follows: -

> " 55. This being a first appeal, the court is expected to analyze and evaluated afresh all the evidence adduced before the lower court and draw its own conclusions while bearing in mind that it neither saw nor heard any of the witnesses. See *Okeno v Republic* [1972] EA 32, *Pandya v Republic* [1957] EA 336 and *Kiilu & Another v Republic* [2005]1 KLR 174.

56. In criminal cases, it is old hat that the standard of proof is beyond reasonable doubt and it was due to this that Mativo, J in *Elizabeth Waithiegeni Gatimu v Republic* [2015] eKLR expressed himself as hereunder:

> "To my mind the rule that the prosecution may obtain a criminal conviction only when the evidence proves the defendant's guilt beyond reasonable doubt is basic to our law. It is necessary that guilt should not only be rational inference but also it should be the only rational inference that could be drawn from the evidence offered taking into account the defence offered if any. If there is any reasonable possibility consistent with innocence, it is the duty of the court to find the defendant not guilty…Having considered the circumstances of this case, the prosecution evidence and the defence offered by the appellant, I am not persuaded that the conviction was justifiable and that this is a case where the accused ought to have been given the benefit of doubt. To give an accused person the benefit of doubt in a criminal case, it is not necessary that there should be many circumstances creating the doubt(s). A single circumstance creating reasonable doubt in a prudent mind about the guilt of an accused is sufficient. The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favorite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea. Reasonable doubt is not mere possible doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence leaves the mind of the court in that condition that it cannot say it feels an abiding conviction to a moral certainty of the truth of the charge."

57. Lord Denning in *Miller v Ministry of Pensions*, [1947] 2 ALL ER 372 had this to say:-

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

4. I am also alive to the provisions of Section 382 of the *Criminal Procedure Code* provides as follows:

> " 382: subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any

inquiry or other proceedings under this *Code*, unless the error, omission or irregularity has occasioned a failure of justice:

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

5. The offence of sexual assaulted is provides under sections 5 and 6 of the *Sexual Offences Act* as follows: -

" 5.

(1) Any person who unlawfully –

(a) penetrates the genital organs of another person with –

(i) any part of the body of another or that person; or

(ii) an object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body, is guilty of an offence termed sexual assault.

(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

6. On the other hand the offence of indecent act with a minor which was the minor alternative offence provides as doth: -

" 11.

(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

7. The first offence was not proved. The alternative county was also not proved. Having not proved the alternative county, the court erred in setting sexual assault as alternative to the alternative count.

8. The court found that neither defilement nor the alternative count of an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* were proved. Upon making this finding the court was enjoined to acquit the Appellant. Instead, she set up a new charge that the Appellant had not pleaded to.

9. The charge was not for a minor or cognate offence but a major offence. She then at the judgment made a decision to charge. I note that the state did not appeal the finding that the charge of defilement and an indecent act with a minor were not proved. I shall not therefore dwell on those offences.

10. Having done so, the only issue is whether, the court can make a decision to charge and proceed to convict. I am comforted that the minor maintained through her testimony that the act did not occur. The victim impact statement was filed. The same is clearly false.

11. The minor testified that she was not defiled. The court found as a fact that there was no defilement. The minor maintained that there was nothing that was done to her. In the PRC form the minor denied penetration. The P3 form indicate the absence of the hymen not tear. The PRC shows there was no hymen.

12. Having found that there was no indecent act with the minor, the court embarked on frolics of its own. She set up the offence of sexual assault. She cited correctly the case of *John Irungu v Republic* [2016] eKLR where it was stated as doth:

> " The real question is whether a person charged with the offence of defilement under section 8(1) can be convicted of the offence of sexual assault contrary to section 5(1) of the *Act* by virtue of the provisions of section 179 of the *Criminal Procedure Code*. Defilement is constituted by committing an act which causes penetration with a "child," defined to mean a person who is less than 18 years old. The Act defines "penetration" to mean partial or complete insertion of the genital organs of a person into the genital organs of another person. Defilement therefore entails penetration of the genitals of a child, genitals qua genitals. The prescribed punishment for defilement is dependent on the age of the child defiled, classified into three clusters, so that the younger the child, the stiffer the sentence. Hence the punishment for defilement of a child who is 11 years or less is life imprisonment; that of a child of between 12 and 15 years is imprisonment for not less than 20 years and defilement of a child between 16 and 18 years is imprisonment for not less than 15 years.
>
> Sexual Assault on the other hand is provided for in section 5 of the *Act*. Unlike defilement, which can be committed only against a child, sexual assault can be committed against "any person." That offence or its punishment is not tied to the age of the victim. The offence is constituted by committing an act which cause penetration of the genital organs of any person by any part of the body of the perpetrator or of any other person or by an object manipulated to achieve penetration. Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose.
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> We are satisfied that the offence of sexual assault can be committed against a child. Where for example there is cogent evidence of penetration of a child by the accused person but the age of the child is not proved, the perpetrator may properly be convicted of sexual assault. As this court observed in *James Maina Njogu v Republic*, Cr. App. No. 38 of 2004 (Nyeri) regarding section 179 of the *Criminal Procedure Code*:
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> > 'It is clear from this section that the power of the court to convict an accused person of an offence lesser than the offence with which the person is charged is only available when the "remaining particulars are not proved", the "remaining

particulars" being the particulars necessary to prove the major offence and which particulars are not required to be proved in respect of the minor offence.'

In the same vein, we stated as follows in *Robert Mutungi Muumbi v Republic*, Cr. App. No. 5 of 2013:

> "An accused person charged with a major offence may be convicted of a minor offence if the main offence and the minor offence are cognate; that is to say, both are offences that are related or alike; of the same genus or species. To sustain such a conviction, the court must be satisfied on two things. First, that the circumstances embodied in the major charge necessarily and according to the definition of the offence imputed by the charge, constitute the minor offence. Secondly, that the major charge has given the accused person notice of all the circumstances constituting the minor offence of which he is to be convicted."

13. This was the case that she completely misunderstood. All particulars constituting the offences of indecent act with a minor and defilement were not proved and she found so. She cannot now, set up a different offence of sexual assault.

14. The court cannot substitute a minor charge with a major one. In any case medical evidence does not corroborate sexual assault. There was no penetration either by an object or a penis. The absence of the hymen is not evidence of defilement. Tearing of the hymen however is.

15. The finding guilty of an offence to which the Appellant has no chance to defend himself is an affront to fair trial. The state did not apply to amend the charge. Neither did they exercise the right to charge. The court cannot take that role.

16. The Appellant filed submissions on 12/3/2024. The Appellant stated that he was acquitted with the offences he was charged with and convicted with an offence he was not charged with. He stated that the foregoing is an affront to the rights of the Appellant under Article 50(2)(b) of the *Constitution*.

17. The Appellant had also set out a defence of alibi. The Appellant submitted that the court disregarded this. He also submitted that teachers lied to the mother, in particular PW5. The Respondent submitted that they support the sentence. The minor testified but at some stage submitted that it was the head teacher who told her in August 2019.

18. The child appears from proceedings being pushed to say something. PW2 spoke of Chebet and Albert on cross-examination, then she stated that she did not see any abnormality in the child. PW3 Pauline Wambui stated that she knows the place she was working was owned by the accused's father. She left the school. On cross-examination it was clear it is the Appellant who reported. She stated that they told the child that they had photos.

19. PW4 gave evidence on P3 form and PRC. The doctor maintained that the victim denied penetration. PW5 – the Investigating Officer. The investigating officer stated that the doctor indicated that there was penetration. Of course such evidence has no probative value since the doctor did not testify that there was penetration.

20. The Appellant was placed on his defence. He stated he was operating a posho mill and milking cows. On 5/8/2019 he was in Nairobi till 24/12/2020, when he came back home. When he came he was informed that he had defiled and presented himself to the police, to clear his name.

21. On being cross-examined he stated that he was in Nairobi. For some strange reasons, he was questioned on his alibi. He stated that the school is owned by his father. He stated that he informed the public on the alibi.

22. DW2 Meshack Gachingiri Githogori stated that he left with Gilbert in Nairobi. His residence was not challenged by cross-examination. DW3 equally confirmed that they worked with the Appellant since 5/8/2019 till 23/12/2023. His evidence was not challenged. Attempts to call the arresting officer Fabian Weru were futile.

23. After evaluating evidence, I note that the Appellant set up a rock solid alibi. The state had a chance even to call a rebuttal witness but chose not to do so. The arresting officer, Fabian Weru was the best person who would have shuttered the alibi. The Appellant offered to call him but he was not successful. The duty to prove the falsity of an alibi lies with the state.

24. In the case of *Isaiah Sawala alias Shady v Republic* [2021] eKLR, Justice H. A. Omondi as he then was stated doth;-

> " The appellant raised an alibi defence, and the position I the burden of proof once an alibi defence is raised, the burden of proving to the contrary lies with the prosecution and cited extensively from past decisions such as. The Court of Appeal in *Victor Mwendwa Mulinge v Republic* [2014] eKLR:
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> > "It is trite law that the burden of proving falsity, if at all, of an accused's defence of alibi lies on the prosecution."
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> This was also stated in "…in *Ssentale v Uganda* [1968] EA 365, 368 [Sir Udo Udoma CJ] …said that a prisoner who puts forwards an alibi as an answer to a charge does not thereby assume any burden of proving that answer; it is a misdirection to refer to any burden as resting on the prisoner in such a case; for the burden of proving his guilt remains throughout on the prosecution. We agree, we have ourselves said so on more than one occasion…The defence of alibi was put forward for the first time some four months after the robbery when the appellant made his unsworn statement in court. Even in such circumstances the prosecution or the police ought to check and test the alibi wherever possible."

25. It is succinct from the medical evidence, that there was no penile or object penetration to the minor. The minor's voice that nothing happened to her was drowned in barrage of questions meant to create confusion and despondency. Having found that medical evidence exonerated the Appellant, it was futile to proceed to the "Newly minted offence of sexual assault."

26. Other than dismantle the alibi and find whether all elements of the crime were proved, the court started on a new but dangerous journey to make a decision to charge at judgment level. With the alibi not having been displaced the Appellant was not guilty of either the offence he was charged with or the offence he was acquitted.

27. Courts must at all times maintain sufficient eventuality to acquit where evidence leads them there or convict where evidence guides. It is not a duty of the court to move from the high pedestal of a neutral arbiter and subsume the role of the prosecutor. It is important that important lanes be maintained in administration of justice. In this one the court failed the Appellant and the justice system.

28. In the circumstances I allow the appeal. I set aside the conviction and sentence, dismiss case in Karatina SO. No. E003 of 2020. I direct that this judgment be served by the Deputy Registrar of the court on V.S. Kosgei (SRM).

Orders

29. The upshot of the foregoing, I make the following orders: -

    a. I set aside the conviction and sentence and set the Appellant free unless otherwise lawfully held.

    b. dismiss case in Karatina SO. No. E003 of 2020.

    c. I direct that this judgment be served by the Deputy Registrar of the court on V.S. Kosgei (SRM).

    d. This file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 14TH DAY OFMARCH,2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mrs. Wahome for the Appellant

Mrs. Kaniu for the Respondent

Court Assistant – Millicent Thaithi